

*(b) Competitive Bidding Methodology for LMDS Licenses*

139. Simultaneous Multiple Round Bidding. We believe that simultaneous multiple round bidding should be the preferred method for licensing LMDS spectrum blocks. Based on the record in this proceeding and our successful experience conducting simultaneous multiple round auctions for narrowband and broadband PCS licenses, we believe that this auction design is the most appropriate for auctioning LMDS licenses. First, we believe that for certain bidders the value of these licenses will be significantly interdependent because of the desirability of aggregation across geographic regions and because, if the Commission provides for more than one license in each geographic service area, licenses within the same area would likely be close substitutes or strong complements. As indicated above, under these circumstances, simultaneous multiple round bidding will generate more information about license values during the course of the auction and provide bidders with more flexibility to pursue back-up strategies than if these licenses are auctioned separately. Simultaneous multiple round bidding is therefore most likely to award licenses to the bidders who value them the most highly and to provide bidders with the greatest likelihood of obtaining the license combinations which best satisfy their service needs. Finally, we expect the value of these licenses to be sufficiently high to warrant the use of simultaneous multiple round auctions. Therefore, we intend to use simultaneous multiple round bidding to award LMDS licenses. We ask commenters to address this tentative conclusion and whether any other competitive bidding designs would be more appropriate for the licensing of this spectrum.

140. Grouping of Licenses. Assuming we use simultaneous multiple round auctions for LMDS licenses, we also seek comment on which blocks should be auctioned together, and the sequencing of each auction. The importance of the choice of license groupings increases with the degree of interdependence among the individual licenses or groups of licenses to be auctioned. Grouping interdependent licenses together and putting them up for bid at the same time will facilitate awarding licenses to bidders who value them the most highly by providing bidders with information about the prices of complementary and substitutable licenses during the course of the auction. Based on the foregoing, we propose to auction all LMDS licenses together in one simultaneous multiple round auction because of the expected value and significant interdependence of the licenses. We seek comment on this tentative analysis and on possible alternative license groupings.

141. Combinatorial Bidding. Another issue for consideration in auction design is whether to permit combinatorial bidding. In general terms, combinatorial bidding allows bidders to bid for multiple licenses as all-or-nothing packages (e.g., all licenses nationwide on a particular spectrum block, with the licenses awarded as a package if the combinatorial bid is greater than the sum of the high bids on the individual licenses in the package).<sup>129</sup>

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<sup>129</sup> In combinatorial bidding, if a bid for a group of licenses exceeds the sum of the highest bids for the individual licenses that comprise the package, then the package bid would win. In the Second

Combinatorial bidding can be implemented with either simultaneous or sequential auction designs. At this time, we do not plan to use combinatorial bidding in LMDS licensing because although we recognize that there may be significant benefits associated with combinatorial bidding, especially in terms of efficient aggregation of licenses, we tentatively conclude that simultaneous multiple round auctions offer many of the same advantages without the same degree of administrative and operational complexity and without biasing auction outcomes in favor of combination bids. We seek comment on the specific combinatorial bidding procedures that should be adopted if combinatorial bidding is used.

142. Alternatively, we may consider modifying the auction rules to directly limit the risk associated with bid withdrawal for those seeking nationwide aggregations. For example, we might cap the bid withdrawal payment (discussed below) for nationwide bidders at five percent of the withdrawn bids. To discourage those who do not truly seek nationwide aggregations of taking advantage of the limitations on bid withdrawal payments and to speed up the auction, nationwide bidders might be subject to the requirement that they be active (defined below) on all license on each nationwide aggregation on which they bid. To ensure adequate competition for licenses which are reoffered after a nationwide withdrawal we might also modify the activity rules (discussed below) so that if any bidder withdraws a bid, the eligibility of all other bidders will be increased by the amount of the withdrawn bid up to each bidder's initial maximum eligibility. We seek comment on this alternative method of facilitating efficient nationwide aggregations.

*(c) GSO/FSS Auction Proposals*

143. In the event a competitive bidding approach is adopted to award GSO/FSS and NGSO/FSS licenses, we emphasize that we would be auctioning *access to the United States only* for use of specific frequency bands within the U.S. Any international access by the satellite users depends on the rules of that particular country. To afford licensees some flexibility in designing their systems and to allow for the uncertainties of the international coordination process, we propose to allow applicants to bid on the total amount of spectrum designated for GSO/FSS and NGSO/FSS services, respectively, set out in the band segmentation plan.

144. As we discussed earlier, it is premature for us to determine whether there will be mutually exclusive applications for GSO/FSS licenses in the band. Applications for GSO/FSS licenses would be mutually exclusive if we do not have a sufficient number of orbit locations to accommodate all qualified applicants. We request comment, with accompanying justification, from applicants and potential applicants, on how many users, within our two

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Report and Order we also indicated that if we were to utilize combinatorial bidding we might institute a premium so that the combinatorial bid would win only if it exceeded the sum of the bids for individual licenses by a set percentage. See Second Report and Order at para. 114. NTIA is the main advocate of combinatorial bidding. See comments of NTIA, and *ex parte* submission of NTIA in PP Docket No. 93-253, Feb. 28, 1994.

degree spacing rule, they believe can be supported in the GSO/FSS segments to provide service to the continental United States (CONUS), without causing harmful interference. If a mutually exclusive situation should arise, we propose to auction the GSO/FSS spectrum at each orbit location in two paired, uplink and downlink, 500 MHz blocks, allowing applicants to bid for up to two blocks. We believe 500 MHz blocks are the smallest spectrum blocks feasible to support a viable FSS system at 28 GHz. We request comment on whether this amount of spectrum is sufficient. If auctions are used to award GSO/FSS licenses, we propose to use a simultaneous multiple round bidding, which will enable bidders to express the value interdependencies between the two blocks. We request comment on whether simultaneous multiple round bidding procedures are appropriate for this spectrum or whether other bidding procedures would better serve the statutory goals.

*(d) NGSO/FSS Auction Proposals*

145. The band segmentation plan designates 500 MHz of unrestricted contiguous spectrum to NGSO/FSS systems. Our preliminary technical analysis indicates that 500 MHz is the minimum amount of spectrum required to implement a viable system offering NGSO/FSS services. For NGSO/FSS systems, a mutually exclusive situation will arise if all qualified applicants are unable to share the spectrum. If mutually exclusive applications are received, we propose to use competitive bidding to award a single license. If competitive bidding is used to award such a license, we propose to conduct a multiple round auction for the entire 500 MHz block of spectrum. This multiple round auction may be either oral or electronic. We request comment from NGSO/FSS applicants and potential applicants on this proposal. Specifically we ask commenters to address the specific application and auction procedures that should be used.

*(e) MSS Feeder Links*

146. We are not proposing competitive bidding rules for MSS feeder links. In the *Second Report and Order* in the Competitive Bidding Rulemaking Proceeding, the Commission decided not to auction intermediate links, including feeder links in the Mobile Satellite Services (MSS).<sup>130</sup> We reasoned that before employing competitive bidding, the Commission is required to determine that mutually exclusive applications are likely to be filed and that such bidding would promote the objectives of Section 309(j)(3)(A) through (D) of the Communications Act. With regard to mutual exclusivity, we noted that in those frequency bands most often utilized as intermediate links, mutual exclusivity is usually avoided by employing a frequency coordination process for each intermediate link prior to the time an application is granted. With regard to the objectives of Section 309(j)(3)(A) through (D), we concluded that auctioning intermediate links could significantly delay the development and rapid deployment of new technologies, products and services for the benefit of the public, that

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<sup>130</sup> See *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, PP Docket No.93-253, Second Report and Order, 9 FCC Rcd. 2348, 2355-56 n. 30 (1994).

auctions for these links could impose significant administrative costs on licensees and the Commission, and that it was unclear whether competitive bidding for intermediate links would recover for the public a significant portion of the value of the spectrum, prevent unjust enrichment or promote efficient and intensive use of the spectrum.<sup>131</sup>

147. We tentatively conclude that FSS spectrum used for MSS feeder links should be excluded from competitive bidding. We base this tentative conclusion on the finding that auctions for MSS feeder links would not achieve the public interest objectives in Section 309(j)(3). The feeder links are an integral part of the MSS systems and the systems would be unable to operate without them. Three MSS systems have also already been licensed and auctioning the feeder links would only delay implementation of service to the public.

(f) *Bidding Procedures*

148. If we use simultaneous multiple round auctions, we generally propose to use bidding procedures similar to those used for broadband PCS.<sup>132</sup> We seek comment, however, on whether any variations on these procedures should be adopted for LMDS or FSS licenses.

149. Bid Increments and Tie Bids. In using simultaneous multiple round auctions to award licenses, it is important to specify minimum bid increments. The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current bidding round. The application of a minimum bid increment speeds the progress of the auction and, along with activity and stopping rules, helps to ensure that the auction comes to closure within a reasonable period of time. Establishing an appropriate minimum bid increment is especially important in a simultaneous auction with a simultaneous closing rule. In that case, all markets remain open until there is no bidding on any license, and a delay in closing one market will delay the closing of all markets. As we recognized in the *Second Report and Order* in the competitive bidding docket, it is important in establishing the amount of the minimum bid increment to express such increment as the greater of a percentage and fixed dollar amount.<sup>133</sup> This will ensure a timely completion of the auction even if bidding begins at a very low dollar amount. Accordingly, we propose to impose a minimum bid increment equal to some percentage of the high bid from the previous round or a dollar amount per MHz per pop, whichever is greater where multiple round bidding is used.

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<sup>131</sup> *Id.* at 2355, para. 43.

<sup>132</sup> *Fifth Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 5532 (1994) (*Fifth Report and Order*), *recon. granted in part*, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1995) (*Fifth Memorandum Opinion and Order*).

<sup>133</sup> *See Second Report and Order, supra*, at para. 126.

150. We propose to announce by public notice prior to auction the specific bid increment that generally will be used. We anticipate using large bid increments early in the auction and reducing the increments as bidding activity falls. We note, however, that the Commission proposes to retain the discretion to set and, by announcement before or during the auction, vary the minimum bid increments for individual licenses or groups of licenses over the course of an auction.<sup>134</sup>

151. Where a tie bid occurs, we propose that the high bidder be determined by the order in which the bids were received by the Commission.<sup>135</sup>

152. Stopping Rules. When simultaneous multiple round auctions are used, a stopping rule must be established for determining when the auction is over. In simultaneous multiple round auctions, bidding may close separately on individual licenses, simultaneously on all licenses, or a hybrid approach may be used. Under an individual, license-by-license approach, bidding closes on each license after one round passes in which no new acceptable bids are submitted for that particular license. With a simultaneous stopping rule, bidding generally remains open on all licenses until there is no new acceptable bid on any license. This approach has the advantage of providing bidders full flexibility to bid for any license as more information becomes available during the course of the auction, but it may lead to very long auctions, unless an activity rule (*see* discussion *infra*, paras. 157 *ff*) is imposed. A hybrid approach combines the first two stopping rules. For example, we may use a simultaneous stopping rule (along with an activity rule designed to expedite closure for licenses subject to the simultaneous stopping rule) for the higher value licenses. For lower value licenses, where the loss from eliminating some back-up strategies is less, we may use simpler license-by-license closings. In the *Competitive Bidding Second Report and Order* we recognized that such a hybrid approach might simplify and speed up the auction process without significantly sacrificing efficiency or expected revenue.<sup>136</sup>

153. For LMDS and FSS auctions, we propose to use a simultaneous stopping rule. Under this proposal, bidding will remain open on all licenses in an auction until bidding stops on every license. We propose that the auction will close after one round passes in which no new valid bids or proactive activity rule waivers (as defined below in the section on activity rules) are submitted. The Commission proposes to retain the discretion, however, to keep the auction open even if no new valid bids and no proactive waivers are submitted. In the event that the Commission exercises this discretion, the effect would be the same as if a bidder had

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<sup>134</sup> In oral or electronic sequential auctions the auctioneer may within his or her sole discretion establish and vary the amount of the minimum bid increment in each round of bidding.

<sup>135</sup> *See Second Report and Order* at 2369.

<sup>136</sup> *Id.*

submitted a proactive waiver.<sup>137</sup> Since we intend to impose an activity rule (as discussed below), we believe that allowing simultaneous closing for all licenses will afford bidders flexibility to pursue back-up strategies without running the risk that bidders will hold back their bidding until the final rounds.

154. In addition, we propose to retain the discretion to declare after forty rounds that the auction will end after some specified number of additional rounds. If this option were used, we propose to only accept bids on licenses where the high bid had increased in at least one of the last three rounds. We seek comment on our proposed use of a simultaneous stopping rule and ask commenters to indicate whether an alternative stopping rule would be more appropriate.

155. Duration of Bidding Rounds. In simultaneous multiple round auctions, bidders may need a significant amount of time to evaluate back-up strategies and develop their bidding plans. We seek comment on the appropriate duration of the bidding rounds as well as the interval between bidding rounds. We propose to retain the discretion to establish the duration and frequency of bidding rounds by public notice before each auction. We also propose to announce any changes to the duration of or intervals between bidding rounds either by public notice prior to the auction, or announcement during the auction. We request comment on this proposal.

156. Bid Withdrawals. We propose to permit a high bidder to withdraw one or more of its high bids during the bid withdrawal period in each round subject to the bid withdrawal payments specified below. If a high bid is withdrawn, we propose that the license be offered in the next round at the second highest bid price. The Commission may at its discretion adjust the offer price in subsequent rounds until a valid bid is received on the license. In addition, to prevent a bidder from strategically delaying the close of the auction, we propose that the FCC retain the discretion to limit the number of times that a bidder may re-bid on a license from which it has withdrawn a high bid.

157. Activity Rules. In the *Second Report and Order*, we adopted the Milgrom-Wilson activity rule as our preferred activity rule where a simultaneous stopping rule is used. See *Second Report and Order* at paras. 144-145. The Milgrom-Wilson approach encourages bidders to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level. Bidders are required to declare their maximum eligibility in terms of MHz-pops, and make an upfront payment proportional to that eligibility

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<sup>137</sup> This will help ensure that the auction is completed within a reasonable period of time, because it will enable the Commission to utilize larger bid increments, which speed the pace of the auction, without risking premature closing of the auction. See *Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 7684-7685 (1994).

level.<sup>138</sup> (See discussion of upfront payments *infra*, para. 167.) That is, in each round, bidders will be limited to bidding on licenses encompassing no more than the number of MHz-pops covered by their upfront payment. Licenses on which a bidder is the high bidder at the end of the bid withdrawal period in the previous round count against this bidding limit. Under this approach, bidders have the flexibility to shift their bids among any licenses for which they have applied so long as, within each round, the total MHz-pops encompassed by those licenses does not exceed the total number of MHz-pops on which they are eligible to bid. Under this approach, to preserve their maximum eligibility, bidders are required to maintain a certain level of bidding activity during each round of the auction. The auction is divided into three stages with increasing levels of bidding activity required in each stage of the auction. A bidder is considered active on a license in the current round if the bidder has submitted an acceptable bid for that license in the current round, or has the high bid for that license at the end of the bid withdrawal period in the previous round, in which case, the bidder does not need to bid on that license in the current round to be considered active on that license. A bidder's activity level in a round is the sum of the MHz-pops associated with licenses on which the bidder is active.

158. We tentatively conclude that the Milgrom-Wilson activity rule should be used in conjunction with the proposed simultaneous stopping rule for LMDS and FSS auctions. We believe that the Milgrom-Wilson approach will best achieve the Commission's goals of affording bidders flexibility to pursue backup strategies, while at the same time ensuring that simultaneous auctions are concluded within a reasonable period of time.

159. Under the Milgrom-Wilson proposal, the minimum activity level, measured as a fraction of the bidder's eligibility in the current round, will increase during the course of the auction. Milgrom and Wilson divide the auction into three stages. We propose to establish the following minimum required activity levels for each stage of the auction: In each round of *Stage One* of the auction, a bidder who wishes to maintain its current eligibility is required to be active on licenses encompassing at least 60% of the MHz-pops for which it is currently eligible. Failure to maintain the requisite activity level will result in a reduction in the amount of MHz-pops upon which a bidder will be eligible to bid in the next round of bidding (unless an activity rule waiver, as defined below, is used). During *Stage One*, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by five-thirds (5/3). Eligibility for each applicant in the first round of the auction is determined by the amount of the upfront payment received and the licenses identified in its auction application. In each round of the *Stage Two*, a bidder who wishes to maintain its current eligibility is required to be active on 80% of the MHz-pops for which it is eligible in the current round. During the second stage, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the

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<sup>138</sup> The number of "MHz-pops" is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license. We use the terms "per MHz-pop" and "per MHz per pop" interchangeably.

current round activity by five-fourths ( $5/4$ ). In each round of *Stage Three*, a bidder who wishes to maintain its current eligibility is required to be active on licenses encompassing 95 percent of the MHz-pops for which it is eligible in the current round. In Stage Three, if activity in the current round is below 95 percent of current eligibility, eligibility in the next round will be calculated by multiplying the current round activity by twenty-nineteenths ( $20/19$ ). We note, however, that the Commission proposes to retain the discretion to set and, by announcement before or during the auction, vary the required minimum activity levels (and associated eligibility calculations) for each auction stage. Retaining this flexibility will improve the Commission's ability to control the pace of the auction and help ensure that the auction is completed within a reasonable period of time.

160. In the PCS auctions, we specified transition guidelines for deciding when the auction would move from Stage One to Stage Two to Stage Three. Those guidelines are based on the "auction activity level," the sum of the MHz-pops of PCS licenses for which the high bid increased in the current round as a percentage of the total MHz-pops of all licenses offered in the auction.<sup>139</sup> However, we also retained the discretion to move the PCS auctions from one stage to another at a rate different from that set out in the guidelines.<sup>140</sup>

161. For the LMDS and FSS auctions, we propose to use the following transition guidelines: The auction will begin in Stage One and move from Stage One to Stage Two when the auction activity level is below ten percent for three consecutive rounds in Stage One. The auction will move from Stage Two to Stage Three when the auction activity level is below five percent for three consecutive rounds in Stage Two. In no case can the auction revert to an earlier stage. We propose, however, that the Commission retain the discretion to determine and announce during the course of an auction when, and if, to move from one auction stage to the next, based on a variety of measures of bidder activity, including, but not limited to, the auction activity level as defined above, the percentage of licenses (measured in terms of MHz-pops) on which there are new bids, the number of new bids, and the percentage increase in revenue.

162. To avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission in a particular round, we propose to provide bidders with a limited number of waivers of the above-described activity rule. We believe that some waiver procedure is needed because the Commission does not wish to reduce a bidder's eligibility due to an accidental act or circumstances not under the bidder's control.<sup>141</sup>

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<sup>139</sup> See, e.g., *Fifth Report and Order* at 5555.

<sup>140</sup> See *Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 6858, 6860 (1994).

<sup>141</sup> See *Second Report and Order* at 2372.



163. We propose to provide bidders five activity rule waivers that may be used in any round during the course of the auction.<sup>142</sup> If a bidder's activity level is below the required activity level, a waiver will automatically be applied. That is, if a bidder fails to submit a bid in a round, and its activity level from any standing high bids (high bids at the end of the bid withdrawal period in the previous round) falls below its required activity level, a waiver will be automatically applied. A waiver will preserve current eligibility in the next round.<sup>143</sup> An activity rule waiver applies to an entire round of bidding and not to a particular BTA service area.

164. Bidders will be afforded an opportunity to override the automatic waiver mechanism when they place a bid if they intentionally wish to reduce their bidding eligibility and do not want to use a waiver to retain their eligibility at its current level.<sup>144</sup> If a bidder overrides the automatic waiver mechanism, its eligibility will be permanently reduced (according to the formulas specified above), and it will not be permitted to regain its bidding eligibility from a previous round. An automatic waiver invoked in a round in which there are no new valid bids will not keep the auction open. Bidders will have the option of proactively entering an activity rule waiver during the bid submission period.<sup>145</sup> If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.

165. The Commission proposes to retain the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control. We also propose to retain the flexibility to adjust by public notice prior to an auction the number of waivers permitted, or to institute a rule that allows one waiver during a specified number of bidding rounds or during specified stages of the auction.<sup>146</sup> We request comment on these proposals.

## 2. *Procedural and Payment Issues*

166. In the *Competitive Bidding Second Report and Order*, as modified by the *Competitive Bidding Reconsideration Order*, the Commission established general procedural and payment rules for auctions, but also stated that such rules may be modified on a service-

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<sup>142</sup> See *Second Report and Order* at 2373.

<sup>143</sup> An activity rule waiver cannot be used to correct an error in the amount bid.

<sup>144</sup> See *Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 6858, 6861 (1994).

<sup>145</sup> Thus, a "proactive" waiver, as distinguished from the automatic waiver described above, is one requested by the bidder.

<sup>146</sup> See *Second Report and Order* at 2373.

specific basis.<sup>147</sup> As discussed below, we generally propose to follow the procedural and payment rules established in Subpart Q of Part 1 of the Commission's Rules, but seek comment on whether any service-specific modifications of these rules are needed based on the particular characteristics of LMDS services.

*(a) Upfront Payments*

167. As in the case of other auctionable services, we propose to require participants in the LMDS and FSS auctions to tender to the Commission in advance of the auction, a substantial upfront payment. We have previously determined that a substantial upfront payment requirement is necessary to ensure that only serious, qualified bidders participate in auctions and to ensure that sufficient funds are available to satisfy any bid withdrawal or default payments (discussed *infra*) that may be incurred. We seek comment on the appropriate amount of such upfront payments for LMDS and satellite auctions. In the PCS auctions the upfront payments was established based on a formula of \$0.02 per pop per MHz for the largest combination of MHz-pops a bidder anticipates being active in any single round of bidding. This upfront payment was designed to require an upfront payment representing approximately 5 percent of the expected value of such licenses. We seek comment on what the appropriate upfront payment price per MHz-pop should be for LMDS and satellite licenses. We also seek comment on whether we should establish a minimum upfront payment for applications and if so what the amount of that minimum upfront should be. In the *Competitive Bidding Second Report and Order*, we established a minimum upfront payment of \$2,500, but we also indicated that the minimum amount could be modified on a service-specific basis.<sup>148</sup> With respect FSS auctions, we seek comment on whether a fixed upfront payment would be more appropriate, and if so, what the amount of that upfront should be.

*(b) Down Payment and Full Payment for Licenses Awarded by Competitive Bidding*

168. The *Competitive Bidding Second Report and Order* generally established a 20 percent down payment requirement for winning bidders to discourage default between the auction and licensing and to ensure payment if such default occurs. We concluded that a 20 percent down payment was appropriate to ensure that auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system, while at the same time not being so onerous as to hinder growth or diminish access.

169. We similarly propose to require all winning bidders in LMDS, GSO\FSS and NGSO\FSS auctions to supplement their upfront payments with a down payment sufficient to

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<sup>147</sup> 9 FCC Rcd at 7249-50, paras. 23-26.

<sup>148</sup> 9 FCC Rcd at 2379, para. 180.

bring their total deposits up to 20 percent of their winning bid(s).<sup>149</sup> Under this approach, winning bidders would be required to submit the required down payment by cashier's check or wire transfer to our lock-box bank by a date to be specified by Public Notice, generally within five (5) business days following the close of bidding. All auction winners would generally be required to make full payment of the balance of their winning bids within five (5) business days following notification by the Commission that it was prepared to award the license. The license would then be granted after this payment was received. We seek comment on whether this is an appropriate requirement for licensing of these services, and whether 20 percent represents an appropriate level of payment. In addition, as discussed more fully below, we ask commenters to address whether any special payment provisions, for example a reduced down payment, should be adopted for designated entities, and if so, for which specific categories of designated entities and why.

(c) *Bid Withdrawal, Default, and Disqualification*

170. As we discussed in the *Second Report and Order*, it is important to the success of our system of competitive bidding that potential bidders understand that there will be a substantial payment assessed if they withdraw a high bid, are found not to be qualified to hold licenses or default on payment of a balance due. Accordingly, we propose to use the bid withdrawal, default and disqualification rules contained Sections 1.2104(g) and 1.2109 of the Commission's Rules for LMDS, GSO\FSS and NGSO\FSS auctions. Pursuant to these rules, any bidder who withdraws a high bid during an auction before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid.<sup>150</sup> No

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<sup>149</sup> If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default payments due, amounts to 20 percent or more of its winning bids, no additional deposit will be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default payments due, the additional monies will be refunded. If a bidder has withdrawn a bid or defaulted but the amount of the payment cannot yet be determined, the bidder will be required to make a deposit of 20 percent of the amount bid on such licenses. When it becomes possible to calculate and assess the additional payment, any excess deposit will be refunded. Upfront payments will be applied to such deposits and to bid withdrawal and default payments due before being applied toward the bidder's down payment on licenses the bidder has won and seeks to acquire.

<sup>150</sup> If a license is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the license is re-offered. If a license is re-offered in the same auction, the winning bid refers to the high bid amount, made subsequent to the withdrawal, in that auction. If the subsequent high bidder also withdraws its bid, that bidder will be required to pay an amount equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the license is offered by the Commission. If a license which is the subject of withdrawal or default is not re-auctioned, but is instead offered to the highest losing bidders in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders would not be

withdrawal payment will be assessed if the subsequent winning bid exceeds the withdrawn bid. After bidding closes, a defaulting auction winner (*i.e.*, a winner who fails to remit the required down payment within the prescribed time, fails to pay for a license, or is otherwise disqualified) will be assessed an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less.<sup>151</sup> The additional three percent payment is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. We propose to hold deposits made by defaulting or disqualified auction winners until full payment of the additional amount.<sup>152</sup> We believe that these additional payments will adequately discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements. In the case of defaults, we also propose to retain discretion to offer a license to the next highest bidder at its final bid price if the default occurs within five business days after the close of bidding. We seek comment on these proposed procedures.

171. In addition, if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, we propose to retain the option to declare the applicant and its principals ineligible to bid in future auctions, or take any other action we deem necessary, including institution of proceedings to revoke any existing licenses held by the applicant.<sup>153</sup>

### 3. *Regulatory Safeguards*

#### (a) *Unjust Enrichment Provisions*

172. The Budget Act directs the Commission to “require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment and as a result of the methods employed to issue licenses and permits.” We therefore propose to adopt the transfer disclosure requirements contained in Section 1.2111(a) of our rules for all LMDS, GSO\FSS and NGSO\FSS licenses obtained through the competitive bidding process. In addition, we propose specific rules governing unjust enrichment by designated entities, which are discussed below. Generally, applicants transferring their licenses within three years after the initial license grant will be required to

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required to accept the offer, *i.e.*, they may decline without additional payment. We wish to encourage losing bidders in simultaneous multiple round auctions to bid on other licenses, and therefore we will not hold them to their losing bids on a license for which a bidder has withdrawn a bid or on which a bidder has defaulted.

<sup>151</sup> See 47 C.F.R. §§ 1.2104(g) and 1.2109

<sup>152</sup> In rare cases in which it would be inequitable to retain a down payment, we will entertain requests for waiver of this provision.

<sup>153</sup> See *Second Report and Order* at para. 198

file, together with their transfer application, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of their licenses. We seek comment on these proposals.

*(b) Performance Requirements*

173. The Budget Act requires the Commission to “include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services.” 47 U.S.C. § 309(j)(4)(B). In the *Competitive Bidding Second Report and Order*, we determined that it was unnecessary and undesirable to impose additional performance requirements, beyond those already provided in the service rules, for all auctionable services. Our proposed LMDS service rules [and GSO\FSS and NGSO\FSS service rules] contain specific performance requirements, such as the requirement to construct and provide service within a specific period of time. Thus, we do not propose to adopt any additional performance requirements for competitive bidding purposes. We seek comment on this tentative conclusion.

*(c) Rules Prohibiting Collusion*

174. In the Competitive Bidding docket, we adopted special rules prohibiting collusive conduct in the context of competitive bidding. We indicated that such rules would serve the objectives of the Budget Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and that disadvantage other bidders. We propose to apply these rules to LMDS, GSO\FSS and NGSO\FSS auctions. Pursuant to these rules, from the time the short-form applications are filed until a winning bidder has made its required down payment, all bidders will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder’s short-form application. In addition, bidders are required by Section 1.2105(a)(2) of the Commission’s Rules to identify on their Form 175 applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process. Bidders will also be required to certify that they have not entered and will not enter into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid.

175. We also propose to require winning bidders, pursuant to Section 1.2107 of the Commission’s Rules, to attach as an exhibit to their license application a detailed explanation of the terms and conditions and parties involved in any bidding consortium, joint venture,

partnership, or other agreement or arrangement they had entered into relating to the competitive bidding process prior to the close of bidding. All such arrangements must have been entered into prior to the filing of short-form applications. In addition, where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may be subject to forfeiture of their down payment or their full bid amount and revocation of their license(s), and they may be prohibited from participating in future auctions. We seek comment on these proposals.

#### *4. Treatment of Designated Entities*

##### *(a) Introduction*

176. In authorizing the Commission to use competitive bidding, Congress mandated that the Commission “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.” 47 U.S.C. § 309(j)(4)(D). The statute requires the Commission to “consider the use of tax certificates, bidding preferences, and other procedures” in order to achieve this Congressional goal. In addition, Section 309(j)(3)(B) provides that in establishing eligibility criteria and bidding methodologies the Commission shall promote “economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.” Finally, Section 309(j)(4)(A) provides that to promote these objectives, the Commission shall consider alternative payment schedules including installment payments.

177. In instructing the Commission to ensure the opportunity for designated entities to participate in auctions and spectrum-based services, Congress was well aware of the problems that designated entities would have in competing against large, well-capitalized companies in auctions and the difficulties they encounter in accessing capital. For example, the legislative history accompanying our grant of auction authority states generally that the Commission's regulations “must promote economic opportunity and competition,” and “[t]he Commission will realize these goals by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women.”<sup>154</sup> The House Report states that the House Committee was concerned that, “unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a

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<sup>154</sup> H.R.Rep. No. 111, 103d Cong., 1st Sess. 254 (1993).

significant increase in concentration in the telecommunications industries.”<sup>155</sup> More specifically, the House Committee was concerned that adoption of competitive bidding should not have the effect of “excluding” small businesses from the Commission’s licensing procedures, and anticipated that the Commission would adopt regulations to ensure that small businesses would “continue to have opportunities to become licensees.”<sup>156</sup> On the other hand, the House Report also states that “the characteristics of some services are inherently national in scope, and are therefore ill-suited for small businesses.”<sup>157</sup>

178. Consistent with Congress’s concern that auctions not operate to exclude small businesses, the provisions relating to installment payments were intended to assist small businesses. The House Report states that these related provisions were drafted to “ensure that all small businesses will be covered by the Commission’s regulations, including those owned by members of minority groups and women.”<sup>158</sup> It also states that the provisions in section 309(j)(4)(A) relating to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not inadvertently favor incumbents with “deep pockets” “over new companies or start-ups.”<sup>159</sup>

179. In addition, with regard to access to capital, Congress had made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that “small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit.”<sup>160</sup> As a result of these difficulties, Congress resolved to consider carefully legislation and regulations “to ensure that small business concerns are not negatively impacted” and to give priority to passage of “legislation and regulations that enhance the viability of small business concerns.”<sup>161</sup> In the Competitive Bidding Second Report and Order, we also indicated that special measures may not be appropriate in all circumstances.

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 255.

<sup>157</sup> *Id.* at 254.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Small Business Credit and Business Opportunity Enhancement Act of 1992, § 331(a) (3), Pub. Law 102-366, Sept. 4, 1992.

<sup>161</sup> *Id.* § 331(b)(2)-(3).

180. We have employed a wide range of special provisions and eligibility criteria designed to meet the statutory objectives of providing opportunities to designated entities in other spectrum-based services. For instance, we determined that minority-owned and women-owned businesses in the nationwide narrowband PCS auction would receive a 25 percent bidding credit on certain channels;<sup>162</sup> in the regional narrowband PCS auction women-owned and minority-owned businesses would receive a 40 percent bidding credit on certain channels and small businesses would be eligible for installment payments on all channels;<sup>163</sup> in the broadband PCS auction, on separate entrepreneurs' blocks, the bidding credits would vary according to the type of qualifying designated entity that applied,<sup>164</sup> and all entrepreneurs' block licensees would be eligible for installment payments.<sup>165</sup> For the Multipoint Distribution Service ("MDS") we adopted a 15 percent bidding credit, reduced upfront payments and installment payments for small businesses, including those owned by members of minority groups and women.<sup>166</sup> In satellite services, we have not proposed or adopted specific measures for designated entities.<sup>167</sup>

181. The measures considered thus far for each service were established after closely examining the specific characteristics of the service and determining whether any particular barriers to accessing capital stood in the way of designated entity opportunities. After examining the record in the competitive bidding proceeding in PP Docket 93-253, we established provisions necessary to enable designated entities to overcome the barriers to accessing capital in each particular service. Moreover, the measures we adopted also were

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<sup>162</sup> *Auctions Third Report and Order* at para. 72.

<sup>163</sup> *Id.* at para. 87. See implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, para. 58 (1994).

<sup>164</sup> *Auctions Fifth Report & Order* at para. 133; *Auctions Fifth Memorandum Opinion & Order* at para. 99; see also *Further Notice of Proposed Rulemaking*, FCC 95-263 (released June 23, 1995).

<sup>165</sup> *Auctions Fifth Memorandum Opinion & Order* at para. 103.

<sup>166</sup> *Report and Order*, MM Docket No. 94-131 and PP Docket 93-253, FCC 95-230 (adopted June 15, 1995).

<sup>167</sup> See *Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, Report and Order, CC Docket No. 92-166, 9 FCC Rcd 5936, 5969-70 (1994); *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Notice of Proposed Rulemaking, IB Docket No. 95-91, paras. 107-108, FCC 95-229 (released June 15, 1995).



designed to increase the likelihood that designated entities who win licenses in the auctions become strong competitors in the provision of wireless services.

182. As in other auctionable services, we fully intend in services using the 28 GHz band to meet the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. At the same time, we must be cautious and deliberative in our selected approach in light of the auction statute's directive to avoid judicial delays<sup>168</sup> and the substantial legal risks involved with providing preferential treatment on the basis of race or gender. In this regard, on June 12, 1995, the Supreme Court ruled in *Adarand Constructors v. Peña*<sup>169</sup> that measures adopted by the federal government awarding preferential treatment on the basis of race are subject to strict scrutiny.<sup>170</sup> To pass muster under that standard, such measures must be narrowly tailored to further compelling government interests.<sup>171</sup>

183. *Adarand* thus introduces an additional level of complexity in implementing Congress' mandate to ensure that businesses owned by minorities and women are provided "the opportunity to participate in the provision of spectrum-based services."<sup>172</sup> Although *Adarand* did not address gender-based preferences, we have included them here in an effort to seek the broadest possible comment. We welcome comment as to the appropriateness of our approach. Accordingly, we seek comment on how we can best promote opportunities for businesses owned by minorities and women in the provision of LMDS and satellite services in light of *Adarand*. We seek the broadest possible comments including, but not limited to, responses to the following questions:

- (1) Does the Commission have a compelling interest in establishing opportunity-enhancing measures in the provision of LMDS and satellite services specifically for minority- and women-owned businesses? If so, what is that compelling

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<sup>168</sup> 47 U.S.C. § 309(j)(3)(A).

<sup>169</sup> 63 U.S.L.W. 4523 (U.S. June 12, 1995).

<sup>170</sup> *Id.*, 63 U.S.L.W. at 4530.

<sup>171</sup> *Id.*

<sup>172</sup> 47 U.S.C. § 309(j)(4)(D).

interest? Would the goal of assuring a "diversity of voices" in the provision of LMDS and satellite services suffice as a compelling interest?<sup>173</sup>

- (2) What evidence (statistical, documentary, anecdotal or otherwise) can be marshalled to support the proposed compelling interest?
- (3) What techniques could the Commission employ that would be narrowly tailored to further the proposed compelling interest? Would such techniques include bidding credits and installment payments? Are race-conscious or gender-conscious measures necessary, or are there race- or gender-neutral measures that would be effective?

Commenters are encouraged to provide the Commission as much evidence as possible with regard to past discrimination, continuing discrimination, discrimination in access to capital, underrepresentation and other significant barriers facing businesses owned by minorities and women in satellite services, services similar to LMDS, and in licensed communications services generally.

184. In the Competitive Bidding docket, we established eligibility criteria and general rules that would govern the award of special provisions for small businesses, rural telephone companies, and minority- and women-owned businesses (collectively, "designated entities"). We also established a menu of possible special provisions that could be awarded to designated entities in particular services, including installment payments, spectrum set-asides, bidding credits, and tax certificates.<sup>174</sup> In addition, we set forth rules to prevent unjust enrichment by designated entities seeking to transfer licenses obtained through use of one of these special provisions.

185. In keeping with the general parameters set forth in the Competitive Bidding docket, we propose specific measures and eligibility criteria for designated entities who seek

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<sup>173</sup> We suggest "diversity of voices" as a possible compelling interest because LMDS is likely to be used as a "medium of mass communication" similar to other multipoint distribution services. See 47 U.S.C. § 309(i)(3)(C)(i). In *Metro Broadcasting v. F.C.C.*, the Supreme Court upheld the Commission's minority preference programs in the awarding of broadcast licenses because they served the "important" governmental interest of promoting diversity in broadcast programming. *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 566-68 (1990). While *Adarand* overrules *Metro*, to the extent that *Metro* applied "intermediate scrutiny," *Adarand* did not reject the diversity interest; rather, it simply held that the diversity interest must be "compelling."

<sup>174</sup> Congress has now repealed the tax credit program in the Communications Act, except with respect to fixed microwave licenses not at issue here. 109 Stat. 93 (1995), P.L. 104-7, April 11, 1995.

to obtain spectrum to provide LMDS and satellite services, designed to ensure that such entities are given the opportunity to participate both in the competitive bidding process and in the provision of these services. We seek comment on these proposals, and specifically on identifying special provisions that are tailored to the unique characteristics of the LMDS and satellite services and that will create meaningful incentives and opportunities for designated entities.

*(b) Installment Payments*

186. We propose to adopt installment payments for small businesses bidding for LMDS licenses. The record in the Competitive Bidding proceeding suggests that the most significant barrier for small business participation in the auctioning of LMDS spectrum will be access to adequate private financing to ensure their ability to compete against larger firms in the competitive bidding process. In the *Competitive Bidding Second Report and Order*, we concluded that a reduced down payment requirement coupled with installment payments is an effective means to address the inability of small businesses bidding for PCS licenses. We seek comment on our proposal to use this same approach in the LMDS auctions, and on whether any additional or alternative special provisions should be provided for small businesses bidding on LMDS spectrum. We also seek comment on whether installment payments are appropriate to encourage small businesses participation in the provision of satellite services.

187. To ensure that large businesses do not become the unintended beneficiaries of installment payment provisions meant for small businesses, we also propose to make the unjust enrichment provisions adopted in the *Competitive Bidding Second Report and Order* applicable to installment payments by small business applicants. Specifically, if a small business making installment payments seeks to transfer a license to a non-small business entity during the term of the license, we propose to require payment of the remaining principle balance and accrued interest as a condition of the license transfer. We seek comment on this proposal including whether additional unjust enrichment provisions are necessary for LMDS licensing. We also seek comment on whether these unjust enrichment would be appropriate if installment payments are also adopted for small businesses participating in satellite auctions.

188. Eligibility Criteria. We propose to define a small business as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding years of less than \$40 million. We believe this standard is appropriate for LMDS service because build-out costs are likely to be significant. Additionally, the cost of acquiring a license is likely to be higher than for other services. We also seek comment on whether this definition is appropriate for small businesses in the context of satellite auctions.

189. Commenters should address whether this is this an appropriate threshold given the expected cost associated with the provision of LMDS and satellite services. Should it be higher or lower, based on the types of companies that are likely to benefit from the special

provisions proposed here? We also propose not to attribute the gross revenues of investors that hold less than 25 percent interest in the applicant, but we will include the gross revenues of the applicant's affiliates and investors with ownership interests of 25 percent or more in the applicant in determining whether an applicant qualifies as a small business. Is a different attribution threshold warranted for LMDS or for satellite services? We seek comment on these issues.

*(c) Bidding Credits*

190. Specific Special Provisions. Based on the list of special provisions for designated entities established in the *Competitive Bidding Second Report and Order*, we propose to utilize bidding credits for small businesses participating in LMDS or FSS auctions. We tentatively conclude that affording such businesses bidding credits and installment payments is the most cost-effective and efficient means of achieving Congress' objective of ensuring an opportunity for these designated entities to participate in the provision of LMDS service, while preserving the advantages of competitive open bidding. We seek comment on this proposal.

191. We request comment on how we should determine the appropriate amount of the bidding credit. Our analysis of the telecommunications industry suggests the possibility that incumbent telecommunications providers may be able to utilize existing infrastructure and thus enjoy economies of scope in the provision of many of the services that may develop in LMDS. Therefore, these incumbents may have the ability to bid more than first-time operators.

192. We propose a bidding credit of 25 percent that would be available on one of the proposed spectrum blocks. We seek comment on the appropriateness of the proposed bidding credits for LMDS and FSS auctions.

193. To prevent unjust enrichment by small businesses trafficking in licenses acquired through the use of bidding credits, we propose imposition of a payment requirement on transfers of such licenses to entities that are not owned by small businesses. Small businesses seeking to transfer a license to an entity that does not meet the eligibility criteria for a small business would be required to reimburse the Government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before the transfer will be permitted. The amount of the penalty would be reduced over time so that a transfer in the first two years of the license term would result in a payment of 100 percent of the value of the bidding credit; in year three of the license term the payment would be 75 percent; in year four the penalty would be 50 percent and in year five the payment would be 25 percent, after which there would be no payment. We seek comment on these proposals.

*(d) Rural Telephone Companies*

194. We seek comment on whether we should provide bidding credits or other special provisions for rural telephone companies. In addition, the vast majority of rural telephone companies will qualify as small businesses and thus will receive installment payment options. Because many of the specific uses proposed for LMDS, including wireless cable and video telecommunications, may be of interest to rural telephone companies, such entities may be interested in bidding for LMDS spectrum. However, we are unable to determine with any certainty the potential prices these services may bring in rural areas. If service prices in such areas are low, acquiring a license should not present significant barriers to rural telephone companies. Also, under one possible approach, the degree of flexibility we would afford in the use of this spectrum, including provisions for partitioning or leasing spectrum, should assist in satisfying the spectrum needs of rural telephone companies at low cost. Finally, as with other incumbent providers of telecommunications services, rural telephone companies may be able to benefit from the use of their existing infrastructure in the provision of some services. Such economies of scale would give rural telephone companies an advantage in the bidding for such licenses. For these reasons, we do not believe that special preferences are needed to ensure adequate participation by rural telephone companies in the provision of services in this spectrum. However, comments on this analysis are requested.

*(e) Additional Special Provisions*

195. In addition to the special provisions proposed above for the various classes of designated entities, we seek comment on whether additional special provisions should be adopted that would enhance our goal of ensuring their participation in the competitive bidding process for LMDS and satellite licenses. We request that commenters give particular attention to the alternatives described below.

196. Reduced Upfront Payments. In the *Competitive Bidding Second Report and Order*, we concluded that upfront payment requirements would ensure that bidders are qualified and serious and would provide the Commission with a source of funds in the event of default or bid withdrawal. 9 FCC Rcd at 2377, 2379, paras. 169, 176. We also noted that reduced upfront payments may be particularly appropriate for auctions of spectrum specifically set aside for designated entities as a means of encouraging participation in the auctions, particularly by all eligible designated entities.<sup>175</sup> We seek comment on whether there should be a similar reduction in upfront payments for small businesses or any other designated entities applying for LMDS or satellite licenses. In addition, we ask commenters to address the costs and benefits with respect to auction administration and designated entity

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<sup>175</sup> *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5599-5600, para. 154.

participation associated with a reduced upfront payment for licenses in LMDS [or satellite services in the absence of a spectrum set-aside.

## **VII. PROCEDURAL MATTERS**

### **A. Ex Parte Rules -- Non-Restricted Proceeding**

197. The rulemaking portion of this proceeding is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally*, 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a). The pioneer's preference portion of this proceeding is restricted. *Ex parte* presentations concerning any formally opposed preference request are prohibited. 47 CFR § 1.1208.

### **B. Initial Regulatory Flexibility Analysis**

198. Reason for action. The purposes of this NPRM are four-fold; first, to obtain comment on the Commission's designation proposal for the 27.5 - 29.5 GHz frequency band; second, to obtain comment on the Commission's proposal for a reallocation pertaining to the 29.5 - 30.0 GHz frequency band; third, to obtain comment on proposed service rules for LMDS and FSS; and fourth, to obtain comment on the Commission's supplemental tentative decision to grant CellularVision a Pioneer's Preference.

199. Objectives. The objective of this Notice is to request public comment on the proposals made herein for the efficient licensing of services in the 27.5 - 30.0 GHz band, for the development and implementation of a new technology to provide innovative telecommunications services to the public.

200. Legal basis. The authority for this action is the Administrative Procedure Act, 5 U.S.C. § 553; and sections 4(i), 4(j), 301, 303(r) of the Communications Act of 1934 as amended, 47 U.S.C. §§ 145, 301, and 303(r).

201. Reporting, recordkeeping and other compliance requirements. Reporting requirements are proposed to ensure that the spectrum, if redesignated for these new uses, is used to serve the public's need for communications services.

202. Federal rules which overlap, duplicate or conflict with these rules. None.

203. Description, potential impact and number of small entities involved. Any rule changes in this proceeding could affect MMDS licensees, the majority of which are small businesses. These entities may have some additional competition from video programming service which could be provided by Suite 12's multicell technology. In addition, rule changes

could affect rural telephone companies, to the extent that any are considered small businesses. These entities may have competition to their local exchange service; alternatively, these entities may be considered designated entities and given bidding and other benefits. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

204. Significant Alternatives. While there are alternative methods to provide the services proposed by LMDS and FSS parties, we find that the services proposed will provide significant competition to existing service providers, thus bringing the benefits of competition to the public.

### **C. Comment Dates**

205. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before August 28, 1995, and reply comments on or before September 18, 1995. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

206. For further information, contact Ms. Susan Magnotti, at (202) 418-0871, Private Wireless Division, Wireless Telecommunications Bureau, or Ms. Donna Bethea, at (202) 739-0728, Satellite and Radiocommunication Division, International Bureau.

### **VIII. ORDERING CLAUSES**

207. Accordingly, IT IS ORDERED That the Notice of Proposed Rulemaking is hereby adopted with proposed rules in Appendix B.

208. IT IS FURTHER ORDERED That the Petition for Rulemaking filed by Harris Corporation-Farinon Division and Digital Equipment Company is DENIED.

209. IT IS FURTHER ORDERED That CellularVision, the successor-in-interest to Suite 12 Group, is tentatively granted a pioneer's preference in accordance with the discussion in paragraphs 68-73 of this Supplemental Tentative Decision.

210. IT IS FURTHER ORDERED That the Acting Secretary shall mail a copy of this document to the Chief Counsel for Advocacy, Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary



## **APPENDIX A**

### **PARTICIPANTS IN THE LMDS/FSS 28 GHZ BAND NEGOTIATED RULEMAKING COMMITTEE:**

Ameritech  
AMSC Subsidiary Corp.  
Andrew Corporation  
Avoca Laboratories, Inc.  
Bell Atlantic Enterprises International  
BellSouth  
Constellation Communications, Inc.  
Digital Microwave Corp.  
Endgate Technology Corporation  
Ellipsat Corporation  
Federal Communications Commission  
GE American Communications, Inc.  
GHz Equipment Co., Inc.  
Harris Corporation - - FARINON Division;  
Hughes Space and Communications Co.  
International CellularVision Association  
International Communications Engineering Group, Inc.  
LDH International  
Loral/QUALCOMM Partnership, L.P  
Martin Marietta Astro Space  
MCI Telecommunications Corporation  
mm-Tech, Inc.  
Motorola Satellite Communications, Inc.  
National Aeronautics and Space Administration  
NYNEX Corporation  
Pacific Telesis Group  
Public Interest Parties<sup>1</sup>  
RioVision of Texas, Inc.

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<sup>1</sup> The "Public Interest Parties" are a group comprised of the following entities: Association of America's Public Television Stations; Public Broadcasting Service; Organization of State Broadcasting Executives; American Council on Education; Commission on Information Technologies of the National Association of State Universities and Land Grant Colleges; Instructional Telecommunications Consortium of the American Association of Community Colleges; Arizona Board of Regents for Benefit of the University of Arizona; Alliance for Higher Education; Iowa Public Broadcasting Board; University of Maine of Augusta; University of Wisconsin System; Washington State University; South Carolina Educational Television Commission; Ana G. Mendez Educational Foundation; Western Cooperative for Educational Telecommunications; California State Polytechnic University, Pomona; California State University, Sacramento; University of Arizona; Northern Arizona University; University of Washington; University of Hawaii System; University of California System; Alliance for Distance Education in California; Troy State University in Montgomery.